Supreme Court, U.S.
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NO. 04 457

IN THE
SUPREME COURT OF THE UNITED STATES

EDDIE ALEXANDER LONG, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE HONEST SERVICES MAIL FRAUD PROVISION OF 18 U.S.C. §1346 IS SO ELASTIC AS TO CRIMINALIZE OPENLY ENGAGED IN CONDUCT BY A SMALL TOWN MAYOR/ MUNICIPAL JUDGE WHERE THERE IS ABSOLUTELY NO EVIDENCE OF FRAUDULENT INTENT NOR ANY EVIDENCE OF DISHONESTY, DECEIT, COVER UP OR CONCEALMENT.

2. WHETHER THE HONEST SERVICES PROVISION OF 18 U.S.C. §1346 IS VOID FOR VAGUENESS.

3. WHETHER THE HONEST SERVICES PROVISION OF 18 U.S.C. §§ 1341 AND 1346 REQUIRES A BUSINESS, CONTRACTUAL OR FIDUCIARY RELATIONSHIP BETWEEN A DEFENDANT AND PURPORTED VICTIM.

4. WHETHER THE DISTRICT COURT VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHTS TO JURY TRIAL, AS SET FORTH IN BLAKELY V. WASHINGTON, 124 S.CT. 2531 (2004), BY JUDICIALLY INCREASING DEFENDANT'S SENTENCE BY EIGHT LEVELS PURSUANT TO THE SPECIFIC OFFENSE CHARACTERISTIC IN U.S.S.G. §2C1.7(b)(1)(B).

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OPINIONS BELOW

A. The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and accompanies this Petition as Item 1 in the appendix.

B. The order of the United States Court of Appeals for the Fourth Circuit denying a petition for rehearing accompanies this Petition as Item 2 in the appendix.

JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on April 16, 2004. A petition for rehearing was timely filed and was denied by the Fourth Circuit on June 3, 2004. The order denying that petition is attached as Item 3 in the Appendix. This Petition is filed within 90 days of the date of the order of denial. Jurisdiction is conferred upon this Court by the provision 28 U.S.C. §1254 and Rules 13.1 and 13.3 of this Court.

STATUTES AND REGULATIONS INVOLVED

This case requires interpretation and application of Fifth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person . . . shall be deprived of life, liberty or property, without due process of law . . ."

18 U.S.C. §1341 reads in pertinent part:

> "Whoever, having devised a scheme or artifice to defraud . . . for the purpose of executing such scheme . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service . . . and knowingly causes to be delivered by mail . . . according to the direction thereon shall be fined under this title or imprisoned . . . "

18 U.S.C. §1346 reads in toto:

> "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

STATEMENT OF THE CASE

A. Federal Jurisdiction

Petitioner was charged and tried on a seven count superceding indictment alleging violations of the provisions of 18 U.S.C. §666, 1001, 1341 and 1346. He was convicted of count two which charged a violation of 18 U.S.C. §§1341 and 1346. As violations of these statutes constitute offenses against the United States, the District Court for the Southern District of West Virginia had original jurisdiction over this case pursuant to the provisions of 18 U.S.C. §3231. The district court entered the final judgment order on July 22, 2003. J.A. 37-41.[1] Petitioner filed his notice of appeal on July 30, 2003. J.A. 43. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to the provisions of 28 U.S.C. §1291.

B. Facts Pertinent To The Issues Presented

Smithers, West Virginia (population approximately 904) is a class IV municipality under West Virginia law and so the mayor statutorily also serves the town as municipal judge. W. Va. Code §8-10-1; J.A. 426. The mayor has control of the police of the municipality, including the power to hire and fire any officers, W.Va. Code §8-10-1 (2002); J.A. 5-10. The judge has jurisdiction over all petty and misdemeanor offenses committed within the town's boundaries, including first and second offense Driving Under the Influence of alcohol or drugs charges (DUI) J.A. 6; W.Va. Const. art. VIII, §11; W.Va. Code §8-10-1. As alleged in the superceding indictment, Petitioner's duties as mayor are set forth in the West Virginia Code, which states.

> "It shall be the duty of the mayor and police officers of every municipality...to aid in the enforcement of the **criminal** laws of the state

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[1]The references to J.A. herein are to the joint appendix filed with the Clerk of the United States Court of Appeals for the Fourth Circuit.

> within the municipality...Failure on the part of any such official or officer to discharge any duty imposed by the provisions of this section shall be deemed official misconduct for which he may be removed from office." (emphasis added)

W.Va. Code §8-14-3 (2002). The mayor "shall see that the ordinances, orders, bylaws, acts, resolutions, rules and regulations of the governing body [of Smithers] are faithfully executed." W.Va. Code §8-10-1 (2002) (governing body is city council).

Smithers Police officers possess the lawful authority to arrest and detain persons for traffic violations that occurred within Smithers. Under state law, when an officer makes a DUI arrest he or she must submit documentation of the arrest to: (1) the city, for use in the criminal DUI case in municipal court; and (2) to the West Virginia Division of Motor Vehicles (DMV), for use in a civil administrative proceeding brought by DMV to revoke the offender's driver's license. J.A. 6.

Petitioner Eddie Long was the elected mayor and municipal judge of Smithers, West Virginia from 1990 until he resigned due to his conviction. In 1997, the Charleston West Virginia Resident Agency of the FBI began investigating Long for suspected bribery and extortion in violation of the Hobbs Act, 18 U.S.C. §1951. The investigation centered on whether Petitioner accepted cash pay-offs to fix DUI charges. J.A. 84-85. The investigation continued until Long's trial in April, 2003. Neither the FBI nor any other law enforcement agency has found any evidence that Petitioner ever extorted money or accepted bribes to reduce DUI or other charges in Smithers Municipal Court and all fines were properly remitted to the town treasury.

Petitioner has resided in Smithers, West Virginia since 1953, where he and his wife raised their 5 children. He is a high school graduate and for 29 years worked as a meat cutter at an A&P grocery store in Beckley, West Virginia. J.A. 422. In 1990 Petitioner ran for and was elected Mayor of Smithers, which is located between the Kanawha River and U.S. Route 60 in Fayette County, West Virginia. Petitioner was re-elected four times to four year terms, most recently in the spring of 2002, a term that he resigned after his conviction in this case. J.A. 423-425.

Despite a six year FBI investigation of suspected bribery and extortion, Long was initially only indicted for alleged offenses growing out of the investigation. J.A. 1-4, the false statement (18 USC §1001) charge related to his voluntary interview with FBI agents in November 2001. The false pretenses charge (18 USC §666) related to his request to Smithers City Counsel for city funds to hire counsel in January 2002 after Smithers Municipal Court records were subpoenaed by a federal grand jury. Due to the §666 charge Petitioner was forced to obtain new counsel, as his initial counsel Thomas Smith was required to withdraw as he had become a witness. Only after declining to plead to either count of that indictment was the February 2003 superceding indictment returned. It was only in the superceding indictment that the concept of "honest services" deprivation of the DMV and State of West Virginia was charged. In counts one through five Petitioner was charged with a scheme "to deprive the State of West Virginia and the West Virginia Division of Motor Vehicles of their intangible right of his honest services as a public official, that is, as the mayor and municipal judge for the city of Smithers" J.A. 8. Petitioner allegedly obstructed and interfered with the state's administrative process involving DUI cases. Specifically, it was charged that Petitioner, in his dual capacity, reduced criminal DUI charges in Smithers Municipal Court down to a

plea to reckless driving, imposed a large fine and further agreed to ensure that the arresting police officer would not attend the DMV license revocation hearing. The officer's failure to appear caused the DMV to dismiss administrative proceedings which could have led to revocation of the alleged offenders' state driver's licenses. Id. Counts one through five involved four different drivers arrested for DUI.

Several witnesses testified with respect to the honest services mail fraud counts each telling the same basic story: an arrest for DUI in Smithers, the driver or a family member discussed the charge with Petitioner, a plea of guilty to reckless driving, payment of a fine in the range of $500.00, and Petitioner agreeing that the arresting officer would not appear at the DMV hearing thereby allowing the driver to maintain his or her driving privileges. The district court permitted several similar acts witnesses – telling the same, or very similar story – to testify. The evidence proved that each DUI arrestee or a family member had a reason, told to Petitioner why they especially needed to keep their driver's license. See, e.g. J.A. 213 (son's drivers license important to family); J.A. 189-190 (aged and ill parents, need for transportation). No evidence was presented even implying that Petitioner sought any benefit to himself.

Petitioner has never denied he openly engaged in the charged conduct. J.A.434. Long did this as plea-bargaining to dispose of DUI charges while acting as municipal judge. J.A. 434. Petitioner also testified that he listened to reasons why arrestees or their families believed there was a substantial need for retaining of the driver's license. J.A. 432; 437-441. Petitioner never tried to hide or conceal this conduct. The record is void of evidence that Petitioner ever attempted to conceal these case resolutions. In fact, the record shows that Long engaged in this practice for many years, often in open

court. Petitioner opined that as many as 10% of DUI cases were resolved this way, although it appears he is not certain about the numbers of cases. J.A. 435. Review of all such cases indicates that Petitioner did not favor any group or class of persons; rather one apparently only had to ask and present a reason Petitioner believed significant enough. The government presented no evidence to prove favoritism.

At trial Petitioner's testimony about his motives for his judicial conduct was limited by the trial court's ruling on relevance grounds. Petitioner was prepared to testify that the city lacked funds to hire a prosecutor, pay court appointed counsel, pay for jury trials or pay the direct and indirect costs of incarceration. J.A. 674. Additional evidence was also available on these points.

The defense also sought to admit evidence of those costs. J.A. 410-412; 427-429. The evidence was offered as relevant to Petitioner's state of mind and his good faith defense; i.e., Long owed a fiduciary duty to Smithers, and he reasonably believed that duty included concern for city finances, and that as a Judge and its chief executive he had the power in his court to act in the city's best interest.

David Bolyard, a DMV administrator testified that no West Virginia law requires an arresting officer to attend a DMV hearing and such occurred with some frequency. He further testified that arresting officers sometimes attended the DMV license revocation hearing, but advised the hearing examiner that they declined to testify based on some agreement between the defendant and a prosecuting attorney or the arresting officer. In such cases the driver retained his or her license. J.A. 57-58. Mr. Bolyard acknowledged that West Virginia law only requires arresting officers to report DUI arrests to the DMV and to do so within forty-eight hours of an arrest.

Based on the evidence, Petitioner moved the court to dismiss counts one through five based on vagueness and sufficiency of the evidence grounds and made the appropriate motions for judgment of acquittal, primarily arguing that the evidence did not make out an honest services violation. All motions, except as to count four, were denied by the court.

The facts of this case must be viewed in the context of several state laws. Therefore, a summary of the laws of West Virginia applicable to the processing of DUI cases in municipal courts may be helpful.

> The arresting officer must transmit an arrest report to DMV within 48 hours of arrest. J.A. 6.
>
> The municipal court clerk, judge or city clerk must transmit an abstract of conviction to DMV for all moving traffic offenses (including DUI) within 72 hours of conviction. W.Va. Code §17B-3-4 (2002)
>
> Municipal courts have jurisdiction over misdemeanor violations of the municipal code W.Va. Code §8-10-1. Municipal criminal traffic ordinances must contain the same elements as the state code analog thereof. W.Va. Code §17C-5-11(a).
>
> A person convicted of second offense DUI is subject to not less than 6 months, nor more than 12 months in jail, and a $100.00 to $500.00 fine. W.Va. Code §17C-5-2(d).
>
> A person convicted of second offense DUI is

> subject to not less than 6 months, nor more than 12 months in jail and a discretionary fine of $1,000.00 to $3,000.00. W.Va. Code §17C-5-2(j).
>
> The minimum jail sentences for conviction of first and second offense DUI "...are mandatory..." and not subject to probation. W.Va. Code § 17C-5-2(p); however, a defendant may be sentenced to alternatives that include jail: work release – W.Va. Code §62-11A-1; community corrections W.Va. Code §62-11C-1. Only since July 1, 2002 has home incarceration under W.Va. Code §62-11B-1 been available as an alternative sentence in municipal courts.

The operation of municipal courts in West Virginia varies a great deal from town to town within the state, and differs from the state's circuit courts of record. In Smithers, the city did not have a city prosecutor so the judge perforce dealt directly with defendants. J.A. 427.

Despite these facts, "[u]nder art. 3, § 14 of the West Virginia Constitution, the right to a jury trial is accorded in both felonies and misdemeanors when the penalty imposed involves any period of incarceration. *Champ v. McGhee*, 165 W.Va. 567, 270 S.E. 2d 445 (1980). The jury required must be comprised of 12 persons. Id. And, a municipal defendant may not be "...imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Bullet v. Staggs*, 162 W.Va. 199, 250 SE 2d 38 (1978). See also *Hubby v. Carpenter*, 177 W.Va. 78, 350 SE 2d 706 (1986) (reaffirming right to jury trial in city court; and holding that municipal mayor's courts do not violate separation of powers doctrine).

Although excluded from evidence at trial, West Virginia law requires that municipalities pay for the costs of incarcerating municipal defendants. W.Va. Code of State Regulations §94-3-5, sub §5.2. The costs were in excess of $42.00 per day at the time of Petitioner's alleged illegal conduct.

As advanced by the prosecution, the state code does make it a misdemeanor "for any person" to obstruct a police officer in the performance of his duties. W.Va. Code §61-5-17(a).

REASONS FOR GRANTING THE WRIT

A. The writ should be granted because, generally and as applied in this case the provisions of §1346 are void for vagueness and have subjected Petitioner and those similarly situated to federal criminal prosecution, conviction and mandatory incarceration with absolutely no notice that his actions could be illegal based upon arbitrary and erratic prosecution decisions.

B. The writ should be granted to give this court the opportunity to specifically set forth the elements of "honest services"mail fraud as such relate to state and local public officials.

1) Granting the writ would permit this Court squarely to rule whether a public official may be guilty of honest services mail fraud absent evidence that he/she engaged in dishonesty, deceit, misrepresentation or concealment.

2) Granting the writ would give the Court the opportunity to address the applicability of §1346 to a public

official's duties to different sovereigns.

3) Granting the writ would allow this Court to clarify whether or not a violation of a substantive federal or state law is a necessary prerequisite for an "honest services" prosecution where there is no evidence of fraud, misrepresentation or dishonesty.

4) Granting the writ would give this Court the opportunity to clarify the scope of the fiduciary duty of a public official.

C. The honest services provisions of 18 USC §1346, are void for vagueness, both as applied to this case and facially, because: (1) it failed to provide fair notice to Mr. Long that conduct which he had openly engaged in for 12 years in the performance of his official duties was criminalized by the statute; and (2) the statute is so broad and vague that it encourages arbitrary and erratic prosecutions. Consequently, the trial court erred by denying Mr. Long's trial and post-trial motions to dismiss and for judgment f acquittal on vagueness grounds.

The conviction of Petitioner in this case establishes the constitutionally untenable proposition that a public official owes a duty of honest services not to the municipal public entity that elected him and for which he served, but rather to the "State" and an agency thereof to which he had no connection other than that his political municipality is a subdivision of the state. Here a municipal court judge and mayor with a twelfth grade education, a retired meat cutter, the chief executive of a financially strapped town in one of the poorest states in this nation, stands to spend two years in prison for allegedly violating a duty to a state agency with which he had no connection whatsoever. There is no state law that requires

police officers to attend DMV hearings. There are specific state statutes in operation here: those requiring the prompt transmission of DUI arrest reports and city court traffic conviction reports to the DMV. These known duties were complied with by Petitioner and the town of Smithers. Petitioner violated no West Virginia law when he directed police officers not to attend DMV hearings. In these circumstances, it is simply unreasonable to conclude that Petitioner or any other small town mayor or judge would be on notice that their conduct violated West Virginia law when he directed police officers not to attend DMV hearings. It is also unreasonable to conclude that Petitioner or any other small town mayor or judge would be on notice that their conduct constitutes federal mail fraud.

Under the government's theory of this case, the small town mayor/judge not only has to deal with the numerous problems of his public positions, but also has some ephemeral duty to a state licensing agency, and therefor to the "State." The potential conflict is obvious; but more obvious is the lack of notice. This Court set out the test for vagueness in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). A statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and "because it encourages arbitrary and erratic convictions." Id. at 162. These tests are a synthesis of the holdings in *United States v. Harris*, 347 U.S. 612 (1954); *Thornhill v. Alabama*, 310 U.S. 88 (1940); and *Herndon v. Lowry*, 301 U.S. 242 (1937). To pass constitutional muster, a criminal statute must: (1) provide definite notice of the offending conduct; and (2) not invite arbitrary and selective prosecution by prosecutors and police. As applied to this case §§1341 & 1346 miserably fail both tests.

The second evil of an unconstitutionally vague criminal

statute is also present in this case: the vagueness of the statute invites arbitrary and erratic prosecution. *Papachristou*, supra. The federal authorities here properly investigated suspicions of bribery and extortion – for six years based almost solely on the openly engaged in actions of Petitioner in plea bargaining. Finding no evidence of such, Long was indicted only for crimes related to the last stages of the investigation: allegedly lying to the FBI and fraudulently obtaining money for a lawyer. Only thereafter did the federal prosecutor consider that Long's open and transparent conduct in plea bargaining DUI cases and keeping officers from DMV hearings, was criminal in violation of the honest services mail fraud statute. After coming up empty after six years of investigation, it appears federal authorities then became creative and decided there must be an honest services case. The timing of events shown by the evidence strongly suggests this happened. This prosecutive action suggests the concerns stated by the court in *United States v. Brumley*, 116 F3 728 (5th Cir. 1997). That court noted that § 1346 did not authorize courts and prosecutors in the first instance to define the quality and range of services owed by a public official to his or her government employer. The court stated that § 1346 does not vest in the federal government "...the right to impose upon states a federal vision of appropriate services – to establish in other words, an ethical regime for state employees" Id. at 731. The court recognized the danger to separation of powers and principles of federalism.

D. Petitioner did not violate the honest services provision of the Federal Mail Fraud Statute , 18 USC §§1341 & 1346, because he: (A) owed a duty of honest services to his public employer – the citizens and Town of Smithers – not to the West Virginia Division of Motor Vehicles, an agency of the State, or the "State of West Virginia;" (B) did not commit any act of deceit

> or dishonesty and did not lie or misrepresent facts to advance the alleged fraud scheme; (C) violated no other Federal, and no local or state law, in carrying out the alleged scheme; and (D) received no personal benefit for, or related to, his allegedly fraudulent conduct. Therefore, the trial court erred in denying Long's trial and post-trial motions for judgment of acquittal on these grounds.

The broad elements of honest services mail fraud are well known. In *United States v. Vinyard*, 266 F 3d 320 (4th Cir. 2001), the court noted that the elements of honest services mail fraud are (1) the existence of a scheme to defraud and (2) mailing of a letter, etc. for the purposes of executing the scheme. Id. at 326. Even though the indictment in this case alleges, and § 1346 speaks in terms of, a "scheme to deprive" the victim of its intangible right of honest services, this deprivation still requires a scheme to defraud and, in order to convict, proof beyond a reasonable doubt of an intent to defraud. This must be the case. Congress enacted § 1346 merely overruled *McNally v. United States*, 483 U.S. 350 (1987), and restore honest services law to the doctrines extant prior to *McNally*. *United States v. Vinyard*, supra. In other words, a scheme to defraud and intent to defraud have always been essential elements.

It is axiomatic that intent to defraud and a scheme to defraud require fraud, which is necessarily characterized by dishonesty and deceit. In *United States v. Bryan*, 58 F. 3d 933 (4th Cir. 1995) the court recognized "that schemes involving various types of dishonesty by public officials come within the ambit of the mail fraud statute because such schemes defraud citizens of their intangible rights to honest and impartial government." Id. at 942; (citations omitted). The Fourth

Circuit noted that Bryan "undertook to disguise his behind – the – scene scheming..." Id. at 942-943; and that defendants in *United States v. Barber*, 668 F 2d 778, (4th Cir.), cert denied., 459 U.S. 829 (1982); and *United States v. Mandel*, 591 F 2d 1347 (4th Cir. 1979), aff'd in part, 602 F 2d 653 (en banc), cert denied, 445 U.S. 961 (1980) had all engaged in dishonest scheming and acts of concealment. Those cases, like virtually all honest services prosecutions, are replete with evidence that the defendant engaged in dishonest and deceitful acts. Petitioner respectfully submits that the conviction in this case cannot stand solely on evidence that the public official openly failed or refused to perform his job in a manner satisfactory to other agencies and to an Assistant United States Attorney. Petitioner would suggest that had DMV officials or state authorities believed Petitioner's actions to be wrong or somehow hurtful, the remedy is to seek legislative redress, not to blindside Petitioner with a federal fraud prosecution.

The trial court's use of West Virginia Code §61-5-17 (a), (obstructing a police officer), does not cure the lack of notice, the vagueness of the statute as applied nor does it supply a sufficient clarifying element to justify conviction. A fair reading of that statute demonstrates that it is aimed at persons who physically or verbally interfere with police officers or refuse their lawful commands. The conduct proscribed, particularly when considered with the case law, clearly applies to suspects, arrestees, and bystanders who interfere with police. Generally, prohibited conduct occurs in the field during a stop, arrest or interrogation event. The other subsections of §61-5-17 support this interpretation: they proscribe escape by various means, e.g. in vehicles or on foot, disarming an officer and similar conduct. The published cases of the West Virginia Supreme Court of Appeals clearly demonstrate the meaning argued herein. State v. Penwell, 199 W.Va. 111, 483 S.E.2d 240 (1996), State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670

(1999).

Because of the nature of the misdemeanor offense in W.Va. Code §61-5-17 (a), it cannot apply to a verbal directive given by a commanding police officer to a subordinate, or by the mayor, the chief executive, related to police business. Otherwise, any time an officer gives a command to a junior police the senior exposes herself to an allegation of criminal conduct. This is anathema to orderly and efficient functioning of any police department. It also would result in chaotic labor relations.

It has been held, that where the prosecution elects to allege a deprivation of honest services by means of violating some other laws, then the prosecution has the burden of proving such violations beyond a reasonable doubt. *United States v. Sawyer*, 85 F 3d 713 (1st Cir. 1996). The trial court instructed the jury only on §61-5-17 (a), but for reasons stated above, that act alone was error. Therefor, no related criminal conduct was proven nor could it have been.

Perhaps the most powerful argument is that review of numerous honest services cases demonstrates that where the prosecution does not prove some limiting factor, then the fact pattern of the case always demonstrates that the public official actually did engage in one or more forms of other prohibited conduct: bribery, extortion, kickbacks, concealment of a substantial conflict of interest, embezzlement or misappropriation, theft of/or use of confidential information. The presence of those factors critically distinguishes honest services fraud from simple misfeasance.

It is perhaps axiomatic that a public official owes a fiduciary duty to the public by virtue of the office held, *United States v. ReBrook*, 58 F 3d 961 (4th Cir. 1995). The parameters

and limits of this duty have not, however, been precisely defined; and are not boundless. To allow prosecutors, due to personal belief or whim, to define such a duty on an *ad hoc* basis is untenable, constitutionally and practically. In a general sense, of course, a public official of any kind should be honest in his dealings with the entire public and all agencies thereof. But prior to imposing the sanction of felony conviction the prosecution must prove a specific duty owed by a public official to government. In this case, the evidence does not prove such a fiduciary duty owed by Petitioner to the DMV. Because there was no duty to the DMV, the derivative duty owed to the state does not exist.

Finally, the evidence proves that Long neither obtained nor attempted to obtain any personal benefit or gain from his conduct. The element of personal gain also is a limiting factor that serves to distinguish omissions from criminal conduct. Most courts have held proof of personal gain is not a requirement to proof of an honest services crime. Nevertheless, proof of personal gain is necessary to a conviction in this case due to the absence of the other limiting factors described above: violation of other laws; dishonesty or deceit; and specific fiduciary duty.

E. As a matter of law, the elected mayor of a class IV municipality in West Virginia, cannot violate the misdemeanor provisions of W.Va. Code §61-5-17 (a) (hindering/obstructing a police office in the performance of his duties) by virtue of mere commands and orders within the scope of his or her authority directed to a police officer. The trial court therefore committed plain error in instructing the jury about §61-5-17 (a).

Close reading of West Virginia Code §61-5-17 (a) conclusively proves that the law is intended for the protection of police officers from harm in carrying out their duties. One could take judicial notice that this statute and others like it serve to protect an officer in the field from physical and verbal resistance caused by suspects, arrested persons and interfering bystanders. See, *State v. Davis*, 199 W.Va. 84, 483 S.E.2d 84 (1996) (noting that §61-5-17 (a) conviction proper where police officer, who was responding to a shots fired call, encountered a third party who verbally assaulted the officer with abusive, threatening and menacing language and then refused officer's order to leave the property). Court noted defendant's conduct exemplified "the very activity to which" 61-5-17 (a) "was directed." See also, *State v. Srnsky*, 213, W.Va. 412, 582 S.E. 2d 859 (2003); and *State v. Phillips*, supra. This statute also fosters efficiency in police operations by punishing persons who unreasonably impede or resist officers in executing their duties in the field.

As previously argued, this statute obviously is not intended to criminalize a verbal command of a mayor or superior officer given to a subordinate concerning activity related to police business. Even if the order is improper, the superior officer has the right to give orders and direct police operations. Conceptually, an order cannot constitute a threat, obstruction, menacing or impeding the subordinate because it is the superior's decision as to what activity constitutes official duties of the lesser police officer. If the trial court's interpretations is correct, then each commanding police officer is exposed to an allegation of criminal conduct based solely on giving an order that the junior police officer questions. The effect on efficient police operations is obvious. Moreover, labor relations will be severely impaired. for these reasons, the trial court erred in its instruction concerning §61-5-17 (a).

F. The District Court denied Long's sixth amendment rights as recently clarified in *Blakely v. Washington*, ___ US ___, 124 S.Ct. 2531 (2004), when the court increased Long's sentence by eight levels.

Long was sentenced under the United States Sentencing Guidelines, calculated as follows: base offense level for honest services mail fraud - level 10 per USSG §2C1.7(a); plus 8 level increase for being an "elected official" per USSG §2C1.7(b)(1)(B); minus two levels for acceptance of responsibility per USSG §3E1.1(a); resulting in a final offense level 16 with a criminal history (no criminal record) category of I, the resulting sentencing range was 21 to 27 months. The court sentenced Long to 24 months prison, 3 years supervised release and a $10,000.00 fine (paid). Without the judge imposed eight level increase, final offense level would have been 8, and the sentencing range 0-6 months. The offense level nearly tripled Long's mandatory guidelines sentence.[2]

Section 2C1.7(b)(1)(B), USSG, provides in part: "If the offense involved an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels." (emphasis added). Application note 2, to §2C1.7(b)(1)(B) states these high-level positions include, e.g.,

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[2]Defendant objected to the 8 level enhancement prior to sentencing, on grounds that it simply was not appropriate with respect to defendant's conduct, and the small size of the public entity - Smithers. The government, arguing for the application of a number of specific offense characteristics and role adjustments claimed the applicable sentencing range was 63 to 78 months; requiring a 5 year sentence under 18 U.S.C. §1341. In the circumstances – including threat of cross-appeal on sentencing issues – Long did not appeal this issue to the Fourth Circuit.

Nevertheless, because his case was pending this petition when Blakely, supra, was decided, precedent teaches that the Blakely error is not waived, and may be raised.

judges and supervisory law-enforcement officers.

Without question, Long was the elected mayor of Smithers, West Virginia, population 904. As such, he was also the town judge and boss of the police department. These facts were related in the superceding indictment. On direct examination, Long testified that he was mayor, judge and head of the police department.

Nevertheless, the trial court's finding that Long was an elected official - for sentencing purposes - violated Long's Sixth Amendment jury trial rights under *Blakely v. Washington*, because: (1) the jury was not instructed that it must find beyond a reasonable doubt that Long was the elected mayor or an official holding a high-level decision - making or sensitive position;" (2) the jury did not make such a finding. Rather, the court, by a preponderance of the evidence standard, found as a fact that Long was an "elected" official, thereby nearly tripling Long's mandated sentence.

The district court charged the jury in conventional mail fraud terms, including that the prosecution must prove beyond a reasonable doubt (1) a scheme to defraud (2) use of the mails (3) intent to defraud; and (4) willfulness. None of these instructions required a jury finding that Long was "elected" or held a high or sensitive position. This is a structural error and not subject to harmless error analysis.

Finally, Long did not admit the sentencing factor, in the sense of a judicial admission. He made no voluntary and knowing waiver of his Sixth Amendment rights as now fully explicated in Blakely.

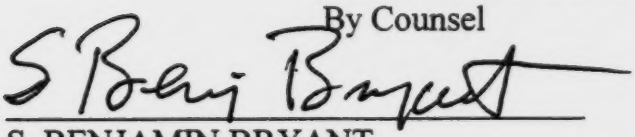
CONCLUSION

At a time when most men are in their retirement, or looking forward to it, Petitioner is preparing to spend at least twenty-one months in federal prison. This because he was convicted of violating a law of which he had no fair notice that it applied to him, for engaging in conduct that was not prohibited by any statute of the State of West Virginia, which benefitted the town and citizens of Smithers, which was openly engaged in for many years. Petitioner has been convicted of a felony and required to resign as mayor for an alleged fraud, although there is absolutely no evidence that he committed any act of deceit or dishonesty, received or sought personal gain, or violated a duty to those to whom he owed any duty.

For all the reasons set forth in this Petition, Petitioner respectfully requests this Court to issue a *Writ of Certiorari,* to permit briefing on the merits and further argument.

Respectfully submitted,

EDDIE ALEXANDER LONG
By Counsel



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